

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Anthony Smith, a Texas prisoner, has filed a *pro se* application for writ of habeas corpus under 28 U.S.C. § 2254. See Dkt. No. 3. His case has been referred to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference from United States District Judge Ed Kinkeade. And the undersigned enters these findings of fact, conclusions of law, and recommendation that the Court should dismiss the habeas application with prejudice as time barred under Rule 4 of the Rules Governing Section 2254 Cases (“Habeas Rule 4”).

Applicable Background

Smith collaterally attacks his Dallas County conviction for aggravated robbery, in which proceedings he entered an open guilty plea to the charge as well as pleas of true to two enhancement paragraphs, and the trial court found him guilty and the enhancement paragraphs true and assessed punishment at life imprisonment. *See State v. Smith*, No. F01-50491-TR (265th Jud. Dist. Ct., Dallas Cnty., Tex.); Dkt. No.

3 at 2-3. This criminal judgment was affirmed on direct appeal in 2002. *See Smith v. State*, No. 05-01-01373-CR, 2002 WL 1263939 (Tex. App. – Dallas June 7, 2002, no pet.); Dkt. No. 3 at 3. And Smith indicates in his Section 2254 application that he did not petition the Texas Court of Criminal Appeals (the “CCA”) for discretionary review. *See* Dkt. No. 3 at 3.

Year later, however, Smith sought state habeas relief, twice. *See Ex parte Smith*, No. W01-50491-R(A) (filed on or around May 7, 2012); WR-77,883-01 (denied by the CCA without written order on July 11, 2012); *Ex parte Smith*, No. W01-50491-R(B) (filed on or around January 21, 2020); WR-77,883-02 (dismissed by the CCA without written order as a subsequent application on March 11, 2020).

After reviewing the Section 2254 application, the Court recognized that it is likely time barred and issued a questionnaire [Dkt. No. 4] to provide Smith fair notice of the limitations issues and to allow him to present his positions as to those issues by filing a verified response by September 21, 2020. It is now almost one month past the deadline for Smith to respond, and he has yet to do so or otherwise contact the Court.

Legal Standards

Under Habeas Rule 4, a district court may summarily dismiss a 28 U.S.C. § 2254 habeas application “if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.”

Id.

This rule differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses. The district

court has the power under [Habeas] Rule 4 to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state. This power is rooted in “the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer.”

Kiser v. Johnson, 163 F.3d 326, 328 (5th Cir. 1999) (quoting 28 U.S.C. foll. § 2254 Rule 4 Advisory Committee Notes).

And the Court may exercise its power to summarily dismiss Smith’s application with prejudice as time barred under Habeas Rule 4.

“[E]ven though the statute of limitations provision of the AEDPA is an affirmative defense rather than jurisdictional,” a district court may dismiss a time barred Section 2254 application *sua sponte* under Habeas Rule 4. *Id.* at 329. “[B]efore acting on its own initiative’ to dismiss an apparently untimely § 2254 petition as time barred, a district court ‘must accord the parties fair notice and an opportunity to present their positions.’” *Wyatt v. Thaler*, 395 F. App’x 113, 114 (5th Cir. 2010) (per curiam) (quoting *Day v. McDonough*, 547 U.S. 198, 210 (2006); alteration to original). Here, the Court’s screening questionnaire provided fair notice, and the record reflects that Smith has chosen not to present his positions as to limitations concerns. See also *Ingram v. Director, TDCJ-CID*, No. 6:12cv489, 2012 WL 3986857, at *1 (E.D. Tex. Sept. 10, 2012) (a magistrate judge’s report and recommendation also gives the parties “fair notice that the case may be dismissed as time-barred, which [gives a petitioner] the opportunity to file objections to show that the case should not be dismissed based on the statute of limitation” (collecting cases)).

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) establishes a one-year statute of limitations for federal habeas proceedings brought

under 28 U.S.C. § 2254. *See ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996*, Pub. L. 104-132, 110 Stat. 1214 (1996). The limitations period runs from the latest of:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

The time during which a properly filed application for state post-conviction or other collateral review is pending is excluded from the limitations period. *See id.* § 2244(d)(2).

The one-year limitations period is also subject to equitable tolling – “a discretionary doctrine that turns on the facts and circumstances of a particular case,” *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999), and only applies in “rare and exceptional circumstances,” *United States v. Riggs*, 314 F.3d 796, 800 n.9 (5th Cir. 2002) (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). “[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: ‘(1) that he has been pursuing his rights diligently, and (2) that some

extraordinary circumstance stood in his way and prevented timely filing.” *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

Taking the second prong first, “[a] petitioner’s failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner’s own making do not qualify.” *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009) (per curiam) (citation omitted). This “prong of the equitable tolling test is met only where the circumstances that caused a litigant’s delay are both extraordinary *and* beyond [the litigant’s] control.” *Menominee Indian Tribe*, 136 S. Ct. at 756 (emphasis in original).¹

But “[t]he diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence.’ What a petitioner did both before and after the extraordinary circumstances that prevented him from timely filing may indicate whether he was diligent overall.” *Jackson v. Davis*, 933 F.3d 408, 411 (5th Cir. 2019) (quoting *Holland*, 560 U.S. at 653; footnote omitted).

A showing of “actual innocence” can also overcome AEDPA’s statute of limitations. See *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). But the actual innocence gateway is only available to a petitioner who presents “evidence of

¹ See, e.g., *Farmer v. D&O Contractors*, 640 F. App’x 302, 307 (5th Cir. 2016) (per curiam) (holding that because “the FBI did not actually prevent Farmer or any other Plaintiff from filing suit” but instead “advised Farmer that filing suit would have been against the FBI’s interest” and “that the RICO claims could be filed after the investigation concluded,” “[a]ny obstacle to suit was ... the product of Farmer’s mistaken reliance on the FBI, and a party’s mistaken belief is not an extraordinary circumstance” (citing *Menominee Indian Tribe*, 136 S. Ct. at 756-57)).

innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.” *Id.* at 401 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)).

That is, the new, reliable evidence must be enough to persuade the Court that “no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.* at 386 (quoting *Schlup*, 513 U.S. at 329).²

Analysis

A conviction becomes final under the AEDPA “when there is no more ‘availability of direct appeal to the state courts.’” *Frosch v. Thaler*, No. 2:12-cv-231, 2013 WL 271423, at *1 (N.D. Tex. Jan. 3, 2013) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009)), *rec. adopted*, 2013 WL 271446 (N.D. Tex. Jan. 24, 2013).

Because Smith did not file a PDR, the applicable state conviction became final

² See also *Johnson v. Hargett*, 978 F.2d 855, 859-60 (5th Cir. 1992) (“The Supreme Court has made clear that the term ‘actual innocence’ means *factual*, as opposed to *legal*, innocence – ‘legal’ innocence, of course, would arise whenever a constitutional violation by itself requires reversal, whereas ‘actual’ innocence, as the Court stated in *McCleskey [v. Zant*, 499 U.S. 467 (1991)], means that the person did not commit the crime.” (footnotes omitted)); *Acker v. Davis*, 693 F. App’x 384, 392-93 (5th Cir 2017) (per curiam) (“Successful gateway claims of actual innocence are ‘extremely rare,’ and relief is available only in the ‘extraordinary case’ where there was ‘manifest injustice.’ *Schlup*, 513 U.S. at 324, 327. When considering a gateway claim of actual innocence, the district court must consider all of the evidence, ‘old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.’ *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotation marks and citations omitted). ‘Based on this total record, the court must make “a probabilistic determination about what reasonable, properly instructed jurors would do.”’ *Id.* (quoting *Schlup*, 513 U.S. at 329). ‘The court’s function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.’ *Id.*” (citations modified)).

under the AEDPA “upon the expiration of the time for seeking further review through the filing of a PDR,” *Phillips v. Quartermann*, No. 3:09-cv-1131-B, 2009 WL 1974302, at *2 (N.D. Tex. July 7, 2009) (citing *Roberts v. Cockrell*, 319 F.3d 690, 692 (5th Cir. 2003)), which was thirty days after the Dallas Court of Appeals affirmed Smith’s criminal judgment – or on Monday, July 8, 2002, *see Flores v. Quartermann*, 467 F.3d 484, 485-86 (5th Cir. 2006); *Roberts*, 319 F.3d at 694 (5th Cir. 2003); TEX. R. APP. P. 68.2; TEX. R. APP. P. 4.1(a).

And, “[b]ecause his state habeas petition[s were] not filed within the one-year period” that commenced on that date, they “did not statutorily toll the limitation clock.” *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013) (citing *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (in turn citing 28 U.S.C. § 2244(d)(2))).

Accordingly, the undated Section 2254 application received by the Court on August 10, 2020 was filed more than 17 years too late.

The application is therefore due to be denied as untimely absent statutory or equitable tolling of the limitations period or establishment of actual innocence. But Smith fails to explain how another provision of Section 2244(d)(1) could apply here, fails to advance a claim of tolling under the narrow actual innocence gateway, and fails to provide allegations that could establish either prong of equitable tolling – that he pursued his rights diligently and that an extraordinary circumstance prevented his timely filing of the federal petition.

The Court should therefore dismiss the Section 2254 petition with prejudice as time barred.

Recommendation and Directions to Clerk

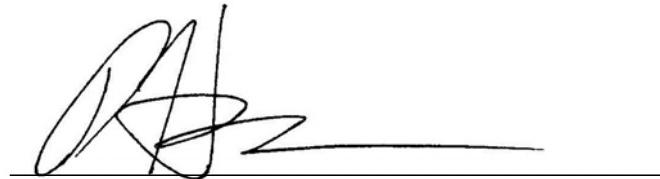
Under Rule 4 of the Rules Governing Section 2254 Cases, the Court should dismiss Petitioner Anthony Smith's 28 U.S.C. § 2254 habeas application with prejudice. And the Court should direct that the Clerk of Court serve any order accepting or adopting this recommendation on the Texas Attorney General.

The Clerk shall serve electronically a copy of this recommendation and the petition, along with any attachments thereto and brief in support thereof, on the Texas Attorney General as counsel for Respondent, directed to the attention of Edward L. Marshall, Chief, Criminal Appeals Division, Texas Attorney General's Office. *See RULE 4, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.*

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).* In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or

adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: October 19, 2020



DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE